Isak Constructions (Aust) Pty Ltd (1) Mikko Amos Isaaka (2) v Adib Faress (1st Defendant/Applicant) Emerald Developments (Aust) Pty Ltd (2) Fares Faress (3)

JUDGMENT Barrett J : New South Wales Supreme Court : 27th August 2003

1 In these proceedings, the plaintiffs seek certain substantive relief concerning ownership and control of the first plaintiff named in the proceedings as Isak Constructions (Aust) Pty Ltd. It is so named even though there is in evidence a certificate of registration on change of name issued by the Australian Securities and Investments Commission on 16 September 2002 stating that the name was on that date changed to "Emerald Constructions (Aust) Pty Ltd". For present purposes, it is not important to inquire into these matters. I shall refer to this party as simply "the Company".

2 The present applicant, Mr Adib Faress, is the first defendant. Among the questions for determination in the proceedings are whether he was validly removed from office as a director of the Company by a purported resolution passed at a purported meeting of shareholders on 4 November 2002. There is also an issue as to the validity of certain instruments by which shares in the company appear to have been transferred by the second plaintiff, Mr Isaaka, and members of his family, to the brother of Mr Faress.

3 Presently before me for determination is an interlocutory process (styled notice of motion) filed by Mr Adib Faress on 15 August 2003. By that interlocutory process, he seeks, pursuant to s.237 of the **Corporations Act** 2001 (Cth), leave to intervene in certain District Court proceedings to which the Company is a party for the purpose of taking responsibility on behalf of the Company for those proceedings.

4 The District Court proceedings were initiated against the Company (under the name "Emerald Constructions (Aust) Pty Ltd") by Michael Lykouresis by statement of liquidated claim filed on 4 December 2002. By that statement of liquidated claim, Lykouresis claimed the sum of $198,439 (plus interest) upon a cause of action pleaded as follows:

"1. On 6 November 2002 the Plaintiff made a payment claim in the sum of $198,439.00 on the Defendant's (sic) pursuant to Section 13 of the Building and Construction Industry Security of Payment Act 1999 which was served upon the Defendant the same day.

2. The Defendant has not provided a payment schedule pursuant to Section 14 of the said Act."

5 On 13 March 2003, a default judgment was entered in the District Court proceedings against the Company. This followed service of the statement of liquidated claim at the registered office of the Company on 17 December 2002. Mr Faress says that he handed the statement of liquidated claim to Mr Isaaka on 18 December 2002 so that Mr Isaaka might deal with it on behalf of the Company. Mr Faress further says that Mr Isaaka did not cause the Company to file a defence and that he became aware that a judgment had been entered against the Company only when moves to levy execution were taken in or about May 2003.

6 I should record at this point that the Company is a building contractor which is in the course of constructing a building known as "Campsie Garden". It is said that the project is so far advanced that it should be completed in about two months time. Mr Faress has guaranteed to the proprietor of the building works at Campsie due and punctual performance by the Company under the building contract. At a practical level, Mr Isaaka attended to the affairs of the Company, including its performance under the building contract, until about 21 February 2003. On that date, Austin J declined to make certain orders sought by the plaintiffs (including Mr Isaaka) and Mr Faress thereafter took on the responsibility for arranging the carrying out of the works on behalf of the Company.

7 Mr Faress wishes to instruct solicitors to apply to have the default judgment in the District Court set aside and any enforcement proceedings (if commenced) stayed. He says that the claim the subject of the District Court proceedings "is disputed in its entirety" adding that it "is not a valid or proper claim against the Company and the proceedings should have been defended". He also says that, so far as he is aware, Mr Isaaka has never taken steps to have the judgment set aside.

8 It is against that background that I proceed to ss.236 and 237 of the **Corporations Act**. Mr Faress' standing under s.236(1)(a) is said by him to derive from his status as a "former officer" of the Company. Under s.9, of course, "officer" includes director. As I have said, one of the issues in the substantive proceedings is whether Mr Faress ceased to be a director by virtue of a purported resolution of shareholders on 4 November 2002 removing him from office. The persons supposedly present and constituting a meeting of the totality of the members on that occasion were Mr Isaaka, his wife and his son. The fact that they purported to pass a resolution removing Mr Faress from office as a director can only mean that, at that time, they accepted that he was a director. Whether or not he is today a director depends upon the efficacy of the steps they then took and that, as I say, is a matter to be determined by the court in due course.

9 In these circumstances, it does not seem to me possible to say with any certainty that Mr Faress is a "former officer" of the Company. Equally, I do not think it can be said with any degree of certainty that he is today "an officer" of the Company. But s.236(1)(a)(ii) makes eligible "an officer or former officer of the company". Although, as I have said, I cannot, with any confidence, place Mr Faress within either of the alternative categories distinguished by the word "or" in s.236(1)(a)(ii), I have no difficulty in concluding that he comes within the description "an officer or former officer of the company" taken as a whole. In other words, if he is not a director, he is a former director; and if he is not a former director, he is a director. On that footing, I am satisfied that he is a person with the requisite standing under s.236(1)(a)(ii).

10 I therefore proceed to the questions posed by s.237(2) noting, as I did in **Charlton v Baber** [2003] NSWSC 745 (15 August 2003), that, if the court is satisfied that all applicable criteria in paragraphs (a) and (e) of s.237(2) are satisfied, it must grant leave as sought; whereas if the court is not so satisfied, it must refuse leave: see **RTP Holdings Pty Ltd v Roberts** (2000) 36 ACSR 170, **Jeans v Deangrove Pty Ltd** [2001] NSWSC 84, **Goozee v Graphic World Group Holdings Pty Ltd** (2002) 42 ACSR 534, **Herbert v Redemption Investments Pty Ltd** [2002] QSC 340.

11 The first matter to which s.237(2) directs attention is that stated in s.237(2)(a), that is, whether it is probable that the Company will not itself take responsibility for the District Court proceedings. In relation to that, Mr Davie of counsel, who appeared for Mr Faress, pointed to three relevant matters. The first is that no steps were taken by Mr Isaaka, on the Company's behalf, to defend the District Court proceedings once initiated or to seek to have the District Court default judgment set aside. That, clearly enough, demonstrates that the Company has not to date been willing to take any step in or in relation to the District Court proceedings. The second matter to which Mr Davie referred is evidence that Mr Faress had expressly made it clear to Mr Isaaka that, despite the disputes about ownership and control existing between them, he regarded the District Court proceedings and appropriate action in relation to them to be within the province of Mr Isaaka, at least in December 2002 when the District Court process was served. The third matter arises from evidence to which I have not yet referred. There is an affidavit of Mr Faress' solicitor confirming that the interlocutory process by which the application with which I am now dealing was initiated was, together with the supporting affidavit, sent by Mr Faress' solicitors to the solicitor who had been acting for the plaintiffs in these proceedings since their inception. This was done on 15 August 2003. However, on 19 August 2003, that solicitor filed a notice of ceasing to act in these proceedings. This, coupled with there having been no appearance for the plaintiffs when the interlocutory process came before me on 25 August 2003, is said by Mr Davie to reinforce the probability that the Company will not be set in motion by Mr Isaaka in the way Mr Faress wishes to have it act in relation to the District Court default judgment.

12 On the basis of all these matters, I am satisfied that it is probable that the Company will not take responsibility for the District Court proceedings, in the sense of initiating and pursuing an application to have the default judgment set aside and thereafter seeking to defend the proceedings on their merits. The s.237(2)(a) condition is therefore satisfied.

13 The next question is whether the court is satisfied that Mr Faress is acting in good faith. In **Swansson v R A Pratt Properties Pty Ltd** (2002) 42 ACSR 313, Palmer J expressed the opinion that at least two questions will generally be relevant to this issue: first, whether the applicant honestly believes that a good cause of action exists and has reasonable prospects of success; and second, whether the applicant is seeking to act in the derivative capacity for such a collateral purpose as would amount to an abuse of process. Mr Faress' honest belief relevant to the first question appears from his affidavit. As to the second question, there is nothing in the circumstances of the present case that seems to me to call in question the motives of Mr Faress in wishing to see the Company apply to have the District Court default judgment set aside so that the proceedings may be defended. It will obviously be to the Company's advantage that the defence he considers it to have be ventilated. It is no doubt part of Mr Faress' motivation that he, as a guarantor of the Company's obligations under the building contract, would wish to see it defend claims that are defensible. In all of the circumstances, I am satisfied that Mr Faress is acting in good faith.

14 Section 237(2)(c) requires that the court be satisfied that it is in the best interests of the Company that Mr Faress be granted leave. For reasons I have stated, I consider this criterion to be met.

15 The s.237(2)(d) requirement does not apply here (restricted, as it is, to applications for leave to bring proceedings), with the result that the final question is that posed by s.237(2)(e), namely, whether the court is satisfied that Mr Faress, at least 14 days before making the present application, gave written notice to the Company of his intention to apply for leave and of the reasons for applying or, in the alternative, that it is appropriate to grant leave even though that requirement as to written notice has not been satisfied.

16 Mr Faress acknowledges that he is not able to show that the requirement with respect to 14 days written notice has been met. I have already referred to the affidavit of Mr Faress' solicitor deposing to service on the then solicitor for the plaintiffs (including, of course, the Company) of the interlocutory process filed on 15 August 2003 together with a copy of the supporting affidavit sworn on 14 August 2003. There are two difficulties with this, from the perspective of s.237(2)(e)(i): first, the notice was given after the interlocutory process was filed on 15 August 2003 (the covering letter bears the same date but the copy enclosed with it bears the court's stamp) so that it cannot be said that the notice was given before the making of the application; and, second, the fact that the copies of the interlocutory process and supporting affidavit, with a covering letter, were sent to the solicitor for the plaintiffs means that it cannot be said that "the applicant gave written notice to the company".

17 Implicit in what I have said about the first matter is the proposition that an application under s.237 is to be regarded as "made" when the relevant initiating court process is filed. This approach is consonant with that taken in other areas: see, for example, **Haxhiu v Minister for Immigration and Multicultural and Indigenous Affairs** [2002] FCA 1526.

18 In relation to this second matter, it is relevant to record that s.237(2)(e)(i), in so far as it refers to the giving of the written notice to a company, should be construed in the light of s.109X which lays down the various methods by which, for the purposes of any law, "a document may be served on a company" (that is, a "company" as defined by s.9, as the Company in this case is). By virtue of s.109X(7), the methods of service to which the section refers are applicable to provisions of a law dealing with service whether it uses the expression "serve" or uses any other

similar expression such as "give" or "send". In s.237(2)(e)(i), the word used is "gave", with the result that s.109X must be taken to apply. Service on a solicitor acting for a company in litigation is not one of the methods of service contemplated by s.109X. (Such service was, however, good service for the purposes of the proceedings, as distinct from the statutory requirement.)

19 No doubt with these considerations in mind, Mr Davie relied on s.237(2)(e)(ii) by submitting that it is appropriate that leave under s.237(2) be granted even though the 14 day notice requirement in s.237(3)(e)(i) has not been satisfied. He did so, in part, on the basis that the steps to which I have referred should be taken to be a suitable substitute. Mr Davie also emphasised the fact that, in Austin J's judgment of 25 July 2003, there was reference to Mr Faress' intention of instructing a solicitor to make an application to set aside the District Court judgment because he considers the judgment debt to be disputed. That intention was stated in clear and unequivocal terms in Mr Faress' affidavit of 23 July 2003.

20 In the light of these facts, it was submitted by Mr Davie that the Company (and, no doubt, the opposing faction within it) must be well aware of Mr Faress' intention to pursue matters in the District Court on behalf of the Company. He referred to the following passage in the judgment of Austin J in **Brightwell v RFB Holdings Pty Ltd** (2003) 44 ACSR 186: *"As to requirement (e), it is not clear from the evidence whether the notice requirement has been satisfied, although it appears that Mr Smith has been aware since at least 23 May 2002 (the date of his affidavit) that the plaintiffs wish to make claims on behalf of the company. In these circumstances it would be pointless to insist upon the notice requirement and I am satisfied that it is appropriate to grant leave even if the 14 days notice has strictly not been given."*

21 I agree that there is no point in insisting on form merely for form's sake. At the same time, however, the discretion conferred by s.237(2)(e)(ii) must be exercised with the objectives of s.237(2)(e)(i) in mind. Those objectives entail awareness by the company concerned not only of the applicant's intention to seek leave under the section but also of the reasons for the application. A decision under s.237(2)(e)(ii) effectively to dispense with those requirements would, it seems to me, be justified only where it was clear to the court that the company was already aware of the matters with which s.237(2)(e)(i) is concerned or that there was some good reason to allow the applicant to represent the company despite its not being so aware.

22 In this case, I am satisfied that the Company has been aware of the relevant matters at least since the service of Mr Faress' affidavit of 23 July 2003 and the publication of Austin J's judgment of 25 July 2003 in these proceedings to which it is a party. That pre-existing awareness must be regarded as having been reinforced by the documents and covering letter faxed on 15 August 2003 to the solicitor then acting in the proceedings for parties including the Company. Although the solicitor ceased acting a few days later, I think I should accept that he would have performed his professional duty of bringing a significant communication of that kind to the attention of his clients, thus effecting the reinforcement to which I have referred.

23 All the elements required by s.237(2) have been dealt with by Mr Faress in a manner that warrants the grant of leave under s.237 that he seeks.

24 The order sought by Mr Faress refers to the Company as "Isak Constructions (Aust) Pty Ltd". In view of the fact that the District Court judgment refers to the Company as "Emerald Constructions (Aust) Pty Ltd" and the content of the certificate of registration on change of name to which I have referred, I think it preferable that identification be by reference to both names and, as a link between the two, the Australian Company Number disclosed by that certificate. The order of the court is therefore as follows: *"Order that leave be granted to Adib Faress to intervene in proceedings 8748 of 2002 in the District Court at the Downing Centre, Sydney, for the purpose of taking responsibility for those proceedings on behalf of the company known as both 'Isak Constructions (Aust) Pty Ltd' and 'Emerald Constructions (Aust) Pty Ltd', being the company having Australian Company Number 003 805 203".*

Mr T.J. Davie - First Defendant
Applicant instructed by Clark McNamara